IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 318 of 2006
With
CIVIL APPLICATION No. 12906 of 2006
In
APPEAL FROM ORDER No. 318 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

CITIBANK EUROPE PLC., IRELAND
Versus
MEGAPAR EXIM PVT. LTD. AND OTHERS

==========

Appearance :
MR MIHIR JOSHI, Senior Counsel assisted by MR TANVISH U BHATT for Appellant.
MR PR NANAVATI for Respondent No.1.
MR HIMANSHU J MEHTA for Respondent No.2.
NOTICE NOT RECD BACK for Respondent No.3.

==========

CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 21/12/2006

ORAL JUDGEMENT

ADMIT. Mr.Premal Nanavati, learned advocate waives service of admission on behalf of respondent no.1. Learned advocate Mr.Himanshu Mehta, waives service of admission of behalf of respondent no.2. Considering the fact that respondent no.3 has not appeared in the suit as well as considering the fact that the decision in this Appeal from Order is not likely to affect the interest of respondent no.3, Mr.Tanvish Bhatt, learned advocate for the appellant seeks permission to delete respondent no.3. Permission is granted. Accordingly, respondent no.3 stands deleted from the present proceedings.

With the consent of the parties, this matter is taken up for hearing today.

The appellant – City Bank Europe PLC, Ireland, had preferred an application before this Court for giving permission to file Appeal from Order against the order of the trial Court, as before the trial Court, appellant was not a party. After such permission was granted, the appellant has filed this Appeal from Order challenging the order passed by learned Chamber Judge, City Civil Court, Ahmedabad dated 25th August, 2006 below Exh.6 in Special Civil Suit No.1506/2006. The aforesaid suit is filed by respondent no.1 – Megapar Exim Private Limited, which is a company registered under the Companies Act, 1956 against respondent no.2 - Dena Bank as well as against respondent no.3 Merlock Financial Services (who is now deleted from this Appeal from order).

It is the case of the plaintiff that the plaintiff wanted to purchase iron scrap and, therefore, an order was placed with defendant no.2 company, which is located at Cologne, Germany, for importing 600

metric tonne H.M.S. (iron scrap) worth US $ 1,17,000/- vide scrap contract No.J2963 dated 8th May, 2006. Aforesaid contract was entered into subject to various conditions as mentioned in the plaint. As per the contract, the shipment was to take place at Kandla, India and last date of shipment was agreed to be 30th June, 2006. It is the case of the plaintiff that the contract was finalized and confirmed and that defendant no.2 had agreed to send the material under payment terms of 45 days after shipment date through defendant no.1 i.e. Dena Bank's letter of credit (who is the banker of the plaintiff) to defendant no.2. It is also the case of the plaintiff that the plaintiff requested defendant no.1 to open letter of credit on 27th May, 2006 and all necessary papers, which were required for opening such account of letter of credit, were submitted before defendant no.1. It is also the case of the plaintiff that such documents contained all specific terms as mentioned in paragraph 3 of the plaint. It is alleged by the plaintiff that even though the plaintiff had given specific instructions in the documents supplied by the plaintiff to enable defendant no.1 to open letter of credit account, defendant no.1 did not take proper care to mention the requisite documents. After having received said letter of credit by defendant no.2's bank at Germany, the appellant herein, which is a negotiating bank, vide telex message dated 8th June, 2006 pointed out to defendant no.1 that the documents, which were required to be mentioned in letter of credit were not mentioned.

It is also the case of the plaintiff that defendant no.1 vide telex message dated 13th June, 2006 informed the appellant, i.e., City Group Bank to make amendment in the documents required to be presented. In view of certain correspondence between plaintiff and defendant no.1, defendant no.1 by a telex message informed City Bank, i.e., appellant herein that the documents received by defendant no.1 are not genuine

documents and in fact, it does not indicate the address of shipping company or its agents. It is also the case of plaintiff that on scrutiny it was found that the documents, which defendant no.1 bank received are all fraudulent and fake documents and requested defendant no.1 to convey the same to the appellant, which is a negotiating bank, to safeguard the interest of the plaintiff. In the plaint, the plaintiff has given particulars about the transaction and nature of documents.

The plaintiff, therefore, filed aforesaid suit for declaration and injunction and in said suit, injunction application was pressed into service and the plaintiff prayed that during the pendency of the suit defendant no.1 may be restrained from making payment of US $ 124,000/- equivalent to Rs.58,03,200/- to City Bank, Ireland Financial, the banker of defendant No.2 and defendant no.1 may be restrained from debiting the said amount from the account of the plaintiff, as the relevant documents submitted in connection with the transaction were all fraudulent and that if injunction is not granted, the plaintiff will suffer immensely.

By the impugned order, learned trial Judge has granted injunction, by which defendant No.1 is restrained from making payment to City Bank.

Since the appellant bank was not party to the suit, an application was preferred by it, which was granted by this Court and therefore, this Appeal from Order is filed.

Mr.Joshi, learned Senior Counsel appearing for the appellant City Bank Europe PLC, submitted that on the basis of the documents which were available and which were required to be considered, and in view of

the letter of credit, payment is already made to defendant no.2. It is argued by Mr.Joshi that it is not the duty of the appellant to find out whether defendant no.2 is fraudulent entity, as ultimately, it was the duty of the plaintiff to find out the credentials of defendant no.2 at the time of entering into agreement and City Bank is required to see only the documentary evidence produced before it to find out whether it is in proper format or not. It is submitted that detailed inquiry was not expected from City Bank to find out the credentials or otherwise of defendant no.2. Mr.Joshi further pointed out that appellant had already made the payment to defendant no.2 on 6-7-2006 and, thereafter, whatever intimation his client might have received was of no consequence as information was sent by defendant no.1 after the payment was made and not before that.

Mr.Himanshu Mehta, learned advocate appearing for Dena Bank (original defendant no.1) submitted that it is true that the City Bank is not required to make full-fledged inquiry about the credentials or otherwise of defendant no.2 and normally, as per the banking customs in case of letter of credit, only documents are required to be considered and whether the person is fraudulent or not is not a subject matter of inquiry at the instance of the banking institution and it is ultimately for the plaintiff to make inquiry at the time of entering into contract.

On the other hand, Mr.Premal Nanavati, learned advocate for the plaintiff submitted that plaintiff has a good prima facie case and that the plaintiff has been defrauded by defendant no.2 as the plaintiff has given a large property by way of security to defendant no.1 and on the basis of which letter of credit account is opened and, in return, his client has not received anything nor defendant no.2 has dispatched any goods, however, on personal inquiry his client found that whereabouts of

defendant no.2 were not known even at the given address. Mr.Nanavati further submitted that when he had pointed out aforesaid aspect to defendant no1, it should have acted promptly, or in any case, the appellant bank should not have made payment to defendant no.2 without making proper inquiry and before making payment, the documents should have been supplied to defendant no.1 bank for further scrutiny.

I have heard learned advocates appearing for the parties at length and I have also gone through the order of the trial Court.

At the time of hearing of this Appeal from Order, consensus is prevailing between the parties and, therefore, it is not necessary to go into the details about prima facie case as well as the question of balance of convenience. It is also not in dispute that the appellant bank has already parted with money by making payment to defendant no.2. The question, now, which is required to be considered is only monetary claim of the plaintiff in the suit. If the plaintiff succeeds in the suit by proving its case against any of the defendants, a decree can be passed in its favour for the loss which it might have suffered. Considering the aforesaid aspect of the matter and in view of the consensus prevailing between the parties, this Appeal from Order is disposed of by giving following directions :

1) It is agreed that the plaintiff shall join appellant – City Bank Europe PLC, Ireland, as party defendant no.3 in the pending suit. Necessary application in this behalf may be given by the plaintiff within a period of four weeks from today. The trial Court shall permit the present appellant – City Bank Europe PLC, Ireland, to be joined as party defendant no.3 and amendment in the plaint

may also be carried out accordingly.

2) After being joined as party to the suit, the appellant bank shall file its written statement within a period of four weeks thereafter.

3) Newly added party defendant, i.e., appellant herein will be at liberty to take all points available in law, as the impugned order is passed in its absence.

4) The parties may complete their pleadings and submit necessary documentary evidence as early as possible so that on that ground the suit may not be delayed.

5) Defendant no.1 shall retain the security given by the plaintiff with it during the pendency of the suit and subject to its rights and contentions in the suit. Defendant no.1 shall release the payment in favour of appellant herein – City Bank Europe PLC, in order to fulfill its obligation under the banking regulations. Correspondingly, defendant no.1 – Dena Bank may be permitted to debit the account of plaintiff, however, no recovery is to be made from the account of the plaintiff till the suit is disposed of, as the Bank can retain the security given by the plaintiff during the pendency of the suit.

6) The parties to abide by the decree passed by the trial Court. If the suit of the plaintiff is decreed for monetary value against either of the defendants, such defendant should abide by such decree, subject to its right to challenge the same by filing an appeal.

7) It is permissible for the plaintiff to amend the plaint by asking

additional reliefs for money decree against all the defendants or against any of the defendant, as deemed fit.

8) Whatever payment, which may be made by Dena Bank to the appellant – City Bank Europe PLC, shall be subject to the final outcome of the proceedings.

Mr.Mihir Joshi, learned Senior Counsel appearing for the appellant, after taking instructions from his client, states that his client gives an oral undertaking before this Court that in case if it is found in the suit that City Bank Europe PLC, i.e., the appellant, was not required to make payment to defendant no.2 or if the appellant herein is found to be an erring party, it will reimburse Dena Bank, by making necessary payment as per the decree passed in that behalf and the appellant shall abide by such decree subject to its right to challenge the same by way of appeal. Statement of Mr.Mihir Joshi is recorded.

Mr.Premal Nanavati, learned advocate submitted that he has given consent to this order after taking instructions from his client, Mr.Parvez Khichi, who, according to Mr.Nanavati, is present in the Court.

Accordingly, the order of the trial Court is modified. Notice of motion submitted before the trial Court stands disposed of accordingly and, notice of motion is not required to be re-heard. Defendant no.1 is permitted to fulfill its banking obligation by making necessary payment to the appellant herein, however, such payment shall be subject to directions given in this order.

It is clarified that this order is passed with the consent of the parties so that interim controversy can be put to an end. Looking to the

nature of transaction, it would be desirable that suit may be put to an end at the earliest as the plaintiff as well as the defendants may ultimately know their fate. In that view of the matter, trial Court is directed to dispose of the suit latest by 31st December, 2007. Though the time limit is fixed, it will be open to the trial Court to expedite the suit and decide the same even prior to the aforesaid date. It is assured by learned advocate for the parties that their clients as well as advocates appearing before the trial Court will cooperate with early disposal of the suit and all necessary cooperation will be extended to the learned trial Judge in this behalf.

It is clarified that this Court has not expressed any opinion on the merits of the issue and since the consensus is prevailing between the parties, observations of the trial Court as well as of this Court may be treated to be tentative in nature and it will have no bearing so far as main suit is concerned, and, it is for the concerned Court to decide the suit as per evidence on record.

In view of above, this Appeal from Order is partly allowed. Order of the trial Court is modified to the aforesaid extent with no order as to costs.

In view of above order on main Appeal from Order, no order on Civil Application No.12906 of 2006.

(P.B.Majmudar, J.)

/malek